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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include
Decatur, Texas in the Dallas-
Fort Worth, Texas Television Market

CS Docket No. 94-42

To: Chief, Cable Services Bureau

COMMENTS

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Brisette TV of Wichita Falls, Inc.
BSP Broadcasting, Inc.

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SUMMARY

The Commission should deny the request of Word of God Fellowship, Inc. ("WOGF"), licensee of KMPX-TV, Decatur, Texas ("KMPX"), to add Decatur, Texas as a designated community in the Dallas-Ft. Worth, Texas television market. The history of KMPX shows a consistent series of efforts to align the Station with the Dallas-Ft. Worth, Texas television market, rather than to construct and operate the Station with the intention of serving Decatur, Texas, the Station's community of license. WOGF's efforts to have the Commission include Decatur in the name of the Dallas-Ft. Worth market represents only the latest step in this process.

In light of WOGF's own efforts to direct KMPX's service to the cities of Dallas and Ft. Worth, WOGF should not now be heard to complain that it is being forced to compete with stations in the Dallas-Ft. Worth market or to pay programming prices comparable to those paid by other stations in that market. This situation is one of WOGF's own making, since WOGF chose to locate the KMPX transmitter in Dallas, chose to provide city grade service to Dallas and Fort Worth, and chose to virtually abandon Decatur. If WOGF did not want KMPX to be treated as a Dallas-Ft. Worth station, it could have located the Station's transmitter in or near Decatur and focused its service on the residents of that community.

The Commission should not view this proposal in a vacuum, without considering the adverse impact that modifying the Dallas-Ft. Worth market would have on the adjacent, and much smaller, Wichita Falls, Texas-Lawton, Oklahoma television market. The

proximity of these markets has led to competition for viewership among stations in these markets, although television stations in the Wichita Falls-Lawton market are severely limited in their ability to compete against stations in the much larger Dallas-Ft. Worth market. Amending the name of the Dallas-Ft. Worth market to include Decatur may: (1) limit the ability of Wichita Falls and Lawton stations to obtain network non-duplication protection; (2) change the copyright status of the Wichita Falls-Lawton stations from "local" to "distant" on cable systems around Decatur, and (3) lead television ratings services to reallocate border counties from the Wichita Falls-Lawton to the Dallas-Ft. Worth market.

If an alternative exists that would serve WOGF's goals and would not produce this negative side effect, the Commission should vigorously pursue that alternative. Such an alternative is for KMPX to obtain the status of a "significantly viewed" station in the areas where KMPX currently receives, or seeks to receive, cable carriage. Significantly viewed status will ensure that KMPX is treated as a "local" station on cable systems within those areas, thereby obviating the need for KMPX to provide any indemnification against copyright liability to be incurred by those cable systems due to their carriage of KMPX's signal. Moreover, including Decatur in the Dallas-Ft. Worth television market may not even allow WOGF to achieve its goals in this proceeding, since both the Cable Bureau and the Copyright Office have acknowledged that amending the name of a television market does not necessarily have implications for copyright purposes.

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COMMENTS

Texoma Broadcasting Corp., licensee of KFDX-TV, Wichita Falls, Texas ("KFDX"); KSWO Television Co., Inc., licensee of KSWO-TV, Lawton, Oklahoma, ("KSWO"); Brissette TV of Wichita Falls, Inc., licensee of KAUZ-TV, Wichita Falls, Texas ("KAUZ"); and BSP Broadcasting, Inc., licensee of KJTL(TV), Wichita Falls, Texas ("KJTL") (collectively, the "Joint Commenters"), by their attorneys, herein file their comments opposing the above-captioned rule making proposal initiated by Word of God Fellowship, Inc. ("WOGF"), permittee of KMPX(TV), Decatur, Texas ("KMPX").

I. INTRODUCTION

The history of KMPX shows a consistent series of efforts by both WOGF and WOGF's predecessor-in-interest to align KMPX with the Dallas-Ft. Worth, Texas television market rather than to construct and operate the Station with the intention of serving Decatur, Texas, the Station's community of license. The numerous efforts made in this regard include:

1. Using a transmitter site within the City of Dallas, thereby providing a predicted city grade contour throughout the cities of Dallas and Ft. Worth, but leaving Decatur, the Station's community of license, outside the predicted city grade contour;^{1/}
2. Applying for Special Temporary Authority ("STA") to waive the requirement that the Station provide city grade service to Decatur;^{2/}
3. Petitioning to change the Station's community of license to Plano, Texas;^{3/} and
4. Twice petitioning to include Decatur in the Dallas-Ft. Worth market for purposes of Section 76.51 of the Rules.^{4/}

The Mass Media Bureau denied the first of WOGF's petitions to include Decatur in the Dallas-Ft. Worth market on July 28, 1993.^{5/} The Bureau explained that since WOGF had not even constructed KMPX, "virtually no evidence upon which the Commission's analysis is

^{1/} See Decatur Telecasting, Inc., 7 FCC Rcd 8622 (Video Services Div. 1992).

^{2/} See Letter Denial (Chief, Video Services Division, May 24, 1993), cited in Request of Word of God Fellowship, Inc. to Amend Section 76.51 of the Commission's Rules to Include Decatur, Texas in the Dallas-Fort Worth, Texas Television Market, 8 FCC Rcd 5075, 5075-76 and n.4 (Mass Media Bureau, 1993) (the "Petition Denial Order").

^{3/} See Amendment of Section 73.606(b) Table of Allotments, Television Broadcast Stations (Decatur and Plano, Texas, MM Docket No. ____, RM-_____, "Request for Withdrawal," filed by WOGF on September 29, 1993, citing "Petition for Reconsideration" filed by WOGF on November 6, 1989 and Opinion Letter (Mass Media Bureau, October 4, 1989). See also Petition Denial Order, 8 FCC Rcd 5075, 5075.

^{4/} See "Petition for Rulemaking" filed by WOGF, May 20, 1993; "Petition for Rulemaking" filed by WOGF, September 29, 1993 (the "Petition").

^{5/} Petition Denial Order.

generally based currently exists in this case."^{5/} The Bureau further said that "there can be no direct and genuine competition with other area stations until the station is on the air."^{2/} In addition, the Bureau held that WOGF's then-pending request to change its community of license to Plano and its STA request to waive the requirement to provide city grade service to Decatur "emphasize the speculative nature of the petitioner's operations and the lack of basis for reevaluating the subject market at this time."^{8/}

Undeterred, WOGF sought to remedy the defects the Bureau identified in WOGF's rejected rule making petition to include Decatur in the Dallas-Ft. Worth market. On September 29, 1993, only five days after applying for a license for KMPX, WOGF again petitioned the Commission to include Decatur in the Dallas-Ft. Worth market, leading to the issuance of the "Notice of Proposed Rule Making" in this proceeding (the "NPRM").^{2/} On the same day WOGF filed the Petition, it also withdrew its Petition for Reconsideration of the Bureau's letter returning its request to change the KMPX city of license to Plano, a community much closer to Dallas and over 50 miles from Decatur.

^{5/} Id. at 5075.

^{2/} Id.

^{8/} Id. at 5076.

^{2/} DA 94-461 (Cable Services Bureau, released May 16, 1994).

In the NPRM, the Cable Services Bureau agreed to test WOGF's proposal through the rule making process, although the Bureau found that WOGF had presented only a "minimal case for redesignation of the subject market."^{10/} The Bureau questioned the adequacy of several aspects of WOGF's showing, finding WOGF to have submitted no information at all in support of some of its assertions and other information that was "not, of itself, determinative" of the issues for which it was presented.^{11/} The Bureau was especially critical of WOGF's attempt to demonstrate the ties between KMPX and the cities of Dallas and Ft. Worth, based on the Station's coverage of those cities with a city grade signal, since such coverage was due to the Station's voluntary use of a transmitter site in Dallas. The Bureau explained:

"it has not been demonstrated, nor is it apparent, that a Decatur station would place such a signal contour over the Dallas-Ft. Worth market without placing its antenna in Dallas"

The Bureau also suggested that WOGF's concerns about potential copyright liability might be alleviated if KMPX could qualify as a "significantly viewed signal" for copyright purposes. The Bureau said that it was "concerned" about "KMPX's emphasis of service to Dallas-Ft. Worth, and away from other segments of the market" and suggested that:

^{10/} NPRM at 2.

^{11/} See, e.g., NPRM at 2-3.

"`significant viewing' status, rather than market hyphenation, may be more appropriate to reflect the true nature of KMPX's competition when it is not clear that KMPX competes for audiences and revenues in areas beyond Dallas-Ft. Worth."^{12/}

Joint Commenters herein urge the Commission to deny the requested amendment of Section 76.51 of the Rules because WOGF's concern about competing against Dallas market stations results solely from WOGF's decision to locate the KMPX transmitter in Dallas and to provide predicted city grade service to Dallas and Ft. Worth rather than to Decatur. Moreover, the remedy proposed in the Petition would have a substantial adverse impact on the adjacent Wichita Falls-Lawton television market. Finally, obtaining significant viewing status would more effectively achieve WOGF's goals in this proceeding without causing any substantial harm to adjacent markets.^{13/}

^{12/} NPRM at 2, n.12.

^{13/} Joint Commenters are aware that WOGF filed "Comments" on June 14, 1994, supplementing the skeletal showing in its Petition with further information purporting to justify the requested amendment of the Dallas-Ft. Worth market. However, since the issues addressed herein are directed toward the underlying need for market modification rather than the specific factors the Commission has previously considered in evaluating such requests, Joint Commenters are not addressing in these opening comments the new arguments presented in WOGF's Comments.

II. DISCUSSION

A. **WOGF Deserves No Relief Based on Its Own Choice to Direct Its Service to the Cities of Dallas and Ft. Worth.**

After taking consistent steps to align itself with the cities of Dallas and Ft. Worth, at the expense of its own community of license, WOGF should not now be heard to complain that it is being forced to compete with stations in the Dallas-Ft. Worth market and to pay programming prices comparable to those paid by other stations in that market. Yet these arguments form the basis of WOGF's claim that the Commission should include Decatur in the Dallas-Ft. Worth market.

WOGF asserts that its "particularized need for requesting the change of market designation" is due to the fact that it "can't buy programs for just Decatur, because [KMPX] places more than a Grade B signal over Dallas/Fort Worth." As WOGF explained:

"syndicators will only sell WOGFI programs that haven't been bought in Dallas/Fort Worth and, if they do, they will charge Dallas/Fort Worth prices. Consequently, since WOGFI can't buy programs based on a small market pricing, the only way that KMPX can compete is to be placed in the same parity as the Dallas/Fort Worth stations."^{14/}

However, this situation is one of WOGF's own making, since WOGF chose to locate the KMPX transmitter in Dallas, chose to provide city grade service to Dallas and Fort Worth, and chose to virtually abandon Decatur, even though the Station remains licensed to that

^{14/} Petition at 4-5.

community. Moreover, since KMPX's location in Dallas presumably allows WOGF to charge higher advertising rates than it could charge if the Station primarily served the areas in and around Decatur, increased advertising revenues from the Dallas-Ft. Worth market is the trade-off for the Station's higher programming costs. At any rate, if WOGF did not want KMPX to be treated as a Dallas-Ft. Worth station, it could have located the Station's transmitter in or near Decatur, and focused its service on the residents of that community, as it is in fact required to do under the terms of its license, the Communications Act and the Commission's Rules.

B. Including Decatur in the Dallas-Ft. Worth Market Would Harm the Adjacent, Smaller, Wichita Falls-Lawton Market.

The Commission should not view the instant NPRM in a vacuum, without considering the adverse impact that modifying the Dallas-Ft. Worth market would have on the adjacent, and much smaller, television market of Wichita Falls, Texas-Lawton, Oklahoma.

The proximity of the Dallas-Ft. Worth and Wichita Falls-Lawton television markets has led to competition for viewership among stations in these markets.^{15/} Unfortunately, television stations

^{15/} For example, two counties located within the Dallas-Ft. Worth ADI -- Wise and Tarrant -- containing a total of 489,700 television households, are also part of the Wichita Falls-Lawton total survey area, meaning that the Wichita Falls-Lawton stations have substantial viewership in these counties. Conversely, three counties in the Wichita Falls-Lawton ADI -- Jack, Young, and Montague -- having a total of 16,000 television households (approximately 10.4% of the Wichita Falls-Lawton ADI), are within the Dallas-Ft. Worth total survey area. See Broadcasting and Cable Yearbook 1994, C123, C141, and C199.

in the Wichita Falls-Lawton market are severely limited in their ability to compete against stations in the much larger Dallas-Ft. Worth market. According to Arbitron's 1993-1994 ADI Market Atlas, the Dallas-Ft. Worth market is the nation's 8th largest television market, containing 1,788,000 television households. By contrast, Wichita Falls-Lawton is the 141st largest market, containing 154,300 television households -- less than nine percent of the total households in the Dallas-Ft. Worth market. Given this substantial size disparity, the loss of even a small number of viewers can threaten the viability of a station in the much smaller Wichita Falls-Lawton market.^{16/}

Amending the Dallas-Ft. Worth market as proposed in the NPRM would adversely impact the Wichita Falls-Lawton market in several respects. It would limit the ability of network affiliated stations licensed to Wichita Falls and Lawton to obtain network non-duplication protection against Dallas-Ft. Worth television stations on cable systems within 35 miles of Decatur where the Wichita Falls-Lawton stations may currently be entitled to receive such protection.^{17/} In addition, it would subject stations

^{16/} Even if a station's viability is not threatened, any decrease in station revenues which would result from a reduction of viewers would have an adverse impact on the station's ability to serve the needs and interests of its community of license and nearby areas.

^{17/} For example, KSWO, the ABC affiliate in Lawton, currently receives network non-duplication protection on the cable system serving Bowie, Texas (a community within 55 miles of Wichita Falls and located in Montague County, which is part of the Wichita Falls-Lawton ADI), as against WFAA-TV, the ABC affiliate licensed to
(continued...)

licensed to Wichita Falls and Lawton to the syndicated exclusivity rules on cable systems where those stations are not presently subjected to syndicated exclusivity.^{18/} Furthermore, television stations licensed to Lawton or Wichita Falls that are currently considered "local" signals for copyright purposes on cable systems within 35 miles of Decatur may become "distant" signals, the carriage of which would subject a cable system to substantial copyright fees, if Decatur is included within the Dallas-Ft. Worth market.^{19/} Ultimately, as television viewers residing near the

^{17/} (...continued)

Dallas. See Section 76.92 of the Commission's Rules, 47 C.F.R. § 76.92. However, if the Commission adds Decatur to the Dallas-Ft. Worth television market, KSWO will no longer be entitled to receive such protection, since Bowie is within 35 miles of Decatur and WFAA-TV would therefore have a higher priority under Section 76.92 of the Rules.

^{18/} For example, KJTL, the Fox affiliate in Wichita Falls, is not presently subjected to syndicated exclusivity as against the Dallas-Ft. Worth market stations on the cable system serving Jacksboro, Texas, which is located within 35 miles of Decatur but farther than 35 miles from both Dallas and Ft. Worth. See Sections 76.151 and 73.151(m) of the Commission's Rules, 47 C.F.R. §§ 76.151 and 73.151(m). However, if the Commission adds Decatur to the Dallas-Ft. Worth market, television stations licensed to Dallas and Ft. Worth will be able to demand syndicated exclusivity on the Jacksboro system as against KJTL, since the rules allow stations to obtain exclusivity on cable systems located within 35 miles of each designated community in a station's hyphenated market.

^{19/} For example, both KFDX and KAUZ would currently be considered "local" signals if they were carried on the cable system located in Alvord, Texas, since both stations cover Alvord with a Grade B signal, thereby qualifying those stations as must-carry stations under former Section 76.59 of the Commission's Rules (which applied to systems in smaller television markets). However, if Decatur were a designated community in the Dallas-Ft. Worth market, the relevant former rule section would become Section 76.61 (which applied to systems in major television markets), under which KFDX and KAUZ would not qualify as must-carries, resulting in those stations being "distant" signals in Alvord.

border of the two markets find increased access to stations from the Dallas-Ft. Worth market, television ratings services may reallocate their counties from the Wichita Falls-Lawton market to the Dallas-Ft. Worth market, yielding reduced cable carriage for stations in the Wichita Falls-Lawton market and substantial losses in viewership levels and advertising revenue.^{20/}

WOGF's unwillingness to serve its own community of license should not prompt the Commission to amend the name of the Dallas-Ft. Worth market in an attempt to remedy a situation of WOGF's own making, when such action would operate to the clear detriment of stations in the adjacent and smaller Wichita Falls-Lawton market. If an alternative solution exists that would not produce this negative side effect, the Commission should vigorously pursue that alternative.

^{20/} This could easily happen, for example, in Montague County in which Bowie is located, as indicted in footnote 17, supra, if KSWO loses its network non-duplication protection on the Bowie cable system. Currently, most viewing of ABC programming by subscribers to that system is credited to the Wichita Falls-Lawton market. Without network non-duplication protection for KSWO, that viewing would likely either be split between KSWO and the ABC affiliate in Dallas-Ft. Worth or, if the Dallas-Ft. Worth ABC affiliate can negotiate network non-duplication rights in Montague County with ABC, credited to the Dallas ABC affiliate. In either event, the Wichita Falls-Lawton stations would experience a substantial viewership loss in Montague County, which could result in ratings services' shifting the county to the Dallas-Ft. Worth market.

**C. WOGF Can More Effectively Achieve Its Desired Result,
Without Harming Adjacent Market Stations, by Obtaining
"Significantly Viewed" Status Throughout Its Market.**

The Commission recognized in the NPRM^{21/} that a better alternative exists for WOGF to achieve its goal: namely, obtaining the status of a "significantly viewed" station in the areas where KMPX currently receives, or seeks to receive, cable carriage.

Significantly viewed status will ensure that KMPX is treated as a "local" station on cable systems within those areas, thereby obviating the need for KMPX to provide any indemnification against copyright liability to be incurred by those cable systems due to their carriage of KMPX's signal. Obtaining significantly viewed status would have no direct effect on the rights of stations in adjacent television markets, such as would occur if the name of the Dallas-Ft. Worth market were amended to include Decatur. As discussed above,^{22/} WOGF deserves no relief based on its need to pay Dallas market prices for its programming, because KMPX's provision of city grade service to Dallas and Ft. Worth is due solely to WOGF's voluntary decision to locate the KMPX transmitter in Dallas and is a matter wholly within WOGF's control. However, since obtaining significant viewership status would eliminate the need for WOGF to pay copyright fees, this approach would also resolve WOGF's concern that it "cannot pay Dallas/Fort Worth prices

^{21/} See NPRM at 2, n.12.

^{22/} See Section II.A., supra.

for programs and also be required to pay distant signal copyright fees."^{23/}

WOGF has provided no evidence that it has even attempted to conduct a significantly viewed survey. Indeed, since the Station has now operated for over a year^{24/}, ample viewership data is already available on which to base such a study. Moreover, by locating KMPX's tower in Dallas, and providing city grade service to Dallas, Ft. Worth, and surrounding areas, WOGF has ensured that KMPX provides a strong signal to the key portions of the Dallas-Ft. Worth market. Finally, the fact that KMPX began operating just over a year ago provides no adequate basis for WOGF not to pursue significant viewership status, since the Commission's Rules provide a simplified method for new stations to demonstrate significant viewership^{25/} and other television stations have obtained significant viewership determinations only months after commencing operations.^{26/}

^{23/} See Petition at 5.

^{24/} Television & Cable Factbook, 1994 ed., A-1127.

^{25/} See 47 C.F.R. § 76.54(d) (allowing a station beginning operations after 1970 to demonstrate significant viewership using county-wide surveys based on viewership data from the station's first three years of operations).

^{26/} See, e.g., Letter to Mark J. Palchick, Esq., CSR-3025 (Video Services Div., Dec. 19, 1986 (granting significantly viewed status to a new television station only six months after the station began operating)).

Moreover, it is far from clear that including Decatur in the Dallas-Ft. Worth television market would allow WOGF to achieve its goals in this proceeding. The Cable Bureau has recently found that a cable system may continue to demand copyright indemnification from a television station, even where the Commission has modified the name of the television market to include the city of license of a television station in whose specified zone the cable system is located. In so doing, the Bureau acknowledged that its decision to amend the name of a television market does not necessarily have implications for copyright purposes. As the Bureau explained:

"The Copyright Office has specifically questioned the Commission's assumption that it would automatically utilize any future changes made by the Commission to the List of Major Television Markets (either in terms of renaming or of reordering them) for copyright purposes. See Notice of Inquiry in Docket No. RM 93-5, 58 Fed. Reg. 34594, 34596 (dated June 28, 1993)."^{27/}

Accordingly, the Bureau found that even following its amendment of a television market name that would appear to have resolved any questions as to the need for copyright indemnification, a cable system may still refuse to carry a television station absent the station's agreement to indemnify the cable system.^{28/}

Despite the Copyright Office's reluctance to accept the Commission's market redesignations for copyright purposes, the

^{27/} R&R Media Corporation, DA 94-476 at 1 (Cable Services Bureau, released May 27, 1994).

^{28/} Id. at 2.

Office has expressed no such reluctance accepting the copyright implications of the Commission's significant viewership determinations. Because adding Decatur as a designated community in the Dallas-Ft. Worth market would not necessarily achieve WOGF's desired goals, but obtaining significantly viewed status is certain to do so, the Commission should decline to amend the name of the Dallas-Ft. Worth market as proposed by WOGF and should instead encourage WOGF to pursue significantly viewed status throughout its market.^{29/}

III. CONCLUSION.

Accordingly, for the reasons stated above, the Commission should DENY the request of Word of God Fellowship, Inc. to include Decatur, Texas in the Dallas-Ft. Worth, Texas television market.

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^{29/} Moreover, the Commission should also consider alternative methods of achieving WOGF's purposes in this proceeding, such as by encouraging WOGF to re-file its request to change its community of license to Plano, Texas.

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CERTIFICATE OF SERVICE

I, Patricia A. Druliner, a secretary in the law firm of Roberts & Eckard, P.C., do hereby certify that a true copy of the foregoing "**COMMENTS**" was sent this 7th day of July, 1994, by first-class United States mail, postage prepaid, to the following:

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